FILED

05-640 SEP 15 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LARRY G. BELLUM,
Petitioner,

v.

PCE CONSTRUCTORS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

C. ERIC MALOUF
Counsel of Record
MICHAEL J. MALOUF, JR.

MALOUF & MALOUF
501 E. CAPITOL STREET
JACKSON, MS 39201
(601) 948-4320
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the Court of Appeals Erred in Applying Regulation 29 C.F.R. § 825.111(b) as It Is Directly Contrary to the Intent of Congress and Reduces the Coverage of the Family and Medical Leave Act as Congress Intended?

II. Whether the Court of Appeals Erred in Applying Regulation 29 C.F.R. § 825.111(b) as the Secretary of Labor Was Not Authorized to Alter the Statutory Framework of the Family and Medical Leave Act?

PARTIES TO THE PROCEEDING

Petitioner

Larry G. Bellum
1647 David Allen Road
Greensburg, Louisiana 70441

Respondent

PCE Constructors, Inc.
Bob Robards, President and Owner
11328 Pennywood Avenue
Baton Rouge, Louisiana
1060 Frank Oakes Road
Fernwood, Mississippi

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Relevant Provisions	1
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	14
Appendix	
Fifth Circuit Decision	App.1
Order Denying Rehearing	App.14

TABLE OF AUTHORITIES

CASES	PAGE
Bliss v. Jennifer Convertibles, Inc., 2003 WL 22239655 (N.D.Ill. 2003)	13
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694(1984)	3
Collinsworth v. Earthlink/Onemain, Inc., 2003 WL 22916461 (D.Kan. 2003)	13
Cousin v. Sofono, Inc., 238 F.Supp.2d 357 (D.Mass. 2003)	12
Dinkins v. Varsity Contractors, Inc., 2005 WL 599979 (N.D. Ill. 2005)	12
Domnick v. Ver Halen, Inc., 2003 WL 23095738 (W.D.Wis. 2003)	13
Figueira v. Black Entertainment Television, Inc., 944 F.Supp. 299 (S.D.N.Y. 1996)	12
Fauntleroy v. Rainbow Marketers, 888 So.2d 1045 (La. App. 2004)	11
Gazda v. Pioneer Chlor Alkali Co., Inc., 10 F.Supp.2d 656 (S.D.Tex. 1997)	12
General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 600, 124 S. Ct. 1236, 1248 (2004)	4

Gonzalez-Wiley v. Tessa Complete Health Care, Inc., et al., 2002 WL 985564 (D.Or. 2002)..... 13

Grimsley v. Fiesta Salons, Inc., 2003 WL 117985 (E.D.Mich. 2003)..... 12

Harbert v. Healthcare Services Group, Inc., 391 F.3d 1140, 1147 (10th Cir. 2004)..... 4,11

Harbert v. Healthcare Services Group, Inc., 173 F.Supp.2d 1101 (D.Colo. 2001)..... 12

Harvell v. North Carolina Ass'n of Educators, Inc., 510 S.E.2d 403 (N.C.App. 1999)..... 12

INS v. Cardoza-Fonseca, 480 U.S. 421, 446-448, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)..... 4

Knight v. Industrial Distribution Group, Inc., 2004 WL 2300477 (D. N.H. 2004)..... 12

Lincoln v. Sears, Roebuck and Co., 2002 WL 31108204 (D.Minn. 2002)..... 13

Mohasco Corp. v. Silver, 447 U.S. 807, 818-819, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980)... 9

Moreau v. Air France, 343 F.3d 1179 (9th Cir. Cal. 2003)..... 11

Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. Fla. 2004)..... 11

Nedzvekas v. LTV Copperweld, 356 F.Supp. 2d (N.D. Ill. 2005)..... 11

Nordquist v. City Fin. Co., 173 F.Supp. 2d 537 (N.D.Miss. 2001)..... 12

Paleologos v. Rehab Consultants, Inc., 990 F.Supp. 1460 (N.D.Ga. 1998)..... 12

Ragsdale v. Wolverine World Wide, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002)..... 8,9

Rich v. Delta Air Lines, Inc., 921 F.Supp. 767 (N.D.Ga. 1996)..... 12

Rollins v. Wilson County Government, 967 F.Supp. 990 (M.D.Tenn. 1997)..... 12

Smallberger v. Federal Realty Investment Trust, 1999 WL 126919 (E.D.Pa. 1999)..... 13

Smith v. University of Chicago Hospitals, 2003 WL 22757754 (N.D.Ill. 2003)..... 12

Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979)..... 11

Sylvester v. Dead River Co., 260 F.Supp.2d 181 (D.Me. 2003)..... 12

Thomas v. Pearle Vision, Inc., 251 F.3d 1132 (7th Cir. Ill. 2001)..... 11

OTHER AUTHORITIES

29 C.F.R. §§ 11..... 2

60 F.R. 2180, 2187 (1995)..... 13

House Report No. 101-28(I)..... 7
House Report No. 102-135(I)..... 7
House Report No. 103-8(I)..... 7,10

Public Law 103-3, Senate Report No. 103-3..... 5,6
Senate Report No. 102-68..... 7

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005). (See also Appendix pp 1-13). The Fifth Circuit denied Bellum's petition for rehearing without opinion.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on April 25, 2005. On June 3, 2005, the Fifth Circuit denied Bellum's Petition for Rehearing En Banc. (See Appendix pp 14-15)

RELEVANT PROVISIONS

This case involves a civil action arising under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. and FMLA regulation 29 C.F.R. §825.111(b). The Fifth Circuit's opinion in this matter has national implications as it addresses an issue of first impression nationally on the FMLA and reduces the coverage of the FMLA as contemplated by Congress.

STATEMENT OF THE CASE

The District Court and Fifth Circuit Court of Appeals correctly found and the parties agree that Mr. Bellum was an "eligible employee." Mr. Bellum had been employed by PCE for more than 12 months and had worked for more than 1250 hours in the previous 12-month period. The District Court and Fifth Circuit also correctly found that the aggregate number of employees at PCE's work sites in Fernwood and Baton Rouge exceeded 50 employees and that the two work sites are less than 75 miles apart when the distance is measured by radius or as the crow flies, but are greater than 75 miles apart when the distance is measured in surface or road miles. Despite the clear intent of Congress that the distance should be measured by "radius" and this Court's ruling in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002), the District Court and Fifth Circuit applied 29 C.F.R. §825.111(b) which states that the 75-mile distance should be measured by surface miles, using surface transportation over public streets, roads, highways and waterways. Said regulation reduces the coverage contemplated by Congress in each and every FMLA case involving the aggregation of employees at different work sites within 75 miles.

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C.§ 1331 (federal question) as this case involves a civil action arising under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. The supplemental jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1367 and principles of pendent jurisdiction.

On April 5, 2004, the District Court for the Southern District of Mississippi, Jackson Division, entered a Final Judgment dismissing this entire case with prejudice. The judgment was a final decision of the District Court, and the

jurisdiction of the Fifth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

1. Regulation 29 C.F.R. § 825.111(b) and the Fifth Circuit's Decision Conflict with the Clear Intent of Congress

Despite the clear mandate of the United States Supreme Court and the clear intent of Congress to use "radius" to measure the 75-mile distance in determining FMLA coverage, the Fifth Circuit and District Court have failed and/or refused to follow same. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), this Court held:

> **First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.** *Chevron*, at 842-3. (emphasis added)

The Court further held:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. (citations omitted) . . . If a court, employing traditional tools of

> statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.* n. 9.

Similarly, in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600, 124 S. Ct. 1236, 1248 (2004), this Court held:

> Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for **only** when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) citing *Chevron*). Here, regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA.

In *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004), the Tenth Circuit Court of Appeals, citing this Court's opinion in *Gen. Dynamics Land Sys.*, at 1248-49, held:

> To ascertain whether Congress had an intent on the precise question at issue, courts should "employ traditional tools of statutory construction." These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes. Also see, the Fifth Circuit's Opinion herein at App. 6.
>
> Congress' intent to use "radius" as the measure of